OHIO'S HOME SOLICITATION SALES ACT: CONSUMER PROTECTION OVERREACH

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I. INTRODUCTION

This Note proposes a policy change to Ohio's Home Solicitation Sales Act, specifically the provisions laid out in Ohio Revised Code §§ 1345.21 through 1345.28.[1] Collectively these provisions (herein referred to as the "Home Solicitation Sales Act" or "HSSA") were enacted to protect consumers from high-pressure home solicitation sales[2] by giving the buyer a right to cancel the sale within three days of signing the sales contract with no obligation. However, the statute requires that sellers provide three different forms of notice of the three-day right to cancel to buyers, violation of which will trigger consequences potentially devastating to small businesses. Particularly, if the seller does not provide the buyer with both written notice of the right to cancel and a separate, pre-addressed cancellation form, then the buyer's right to cancel becomes indefinite. Should the buyer decide to exercise this right, he or she is entitled to a full refund. While the buyer must return any goods received as part of the transaction, he or she cannot return services. This poses a significant challenge to small businesses that provide home restoration or remodeling services. Not only do they provide labor, but they also provide the necessary construction materials, which also cannot be returned to the seller upon a cancellation since these materials become part of the buyer's home. Thus businesses providing a service, such as home renovation and restoration businesses, receive a double hit if one of their salespeople simply forgets to provide

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[1] *See generally* OHIO REV. CODE ANN. §§ 1345.21–1345.28 (West 2014).

[2] Home Solicitations Sales are defined as:

> [A] sale of consumer goods or services in which the seller or a person acting for the seller engages in a personal solicitation of the sale at a residence of the buyer, including solicitations in response to or following an invitation by the buyer, and the buyer's agreement or offer to purchase is there given to the seller or a person acting for the seller, or in which the buyer's agreement or offer to purchase is made at a place other than the seller's place of business. *Id.* § 1345.21(A).

a cancellation form, or if the buyer claims to have not received it.[3] Even if the seller has fully performed, the buyer can later cancel the sale and receive a full refund of any payments made to the seller. The seller receives no compensation for either the cost of labor or for the materials provided. Such losses can amount to tens of thousands of dollars—a crippling amount for many small businesses.

There are a number of cases in Ohio, as well as other states, which demonstrate that HSSA is being abused. In virtually all of these cases, the dispute arises when a buyer claims to be dissatisfied with the services provided. Once buyers learn of HSSA, and are lucky enough to have not been provided one of the required forms of notice, they can simply cancel the sale with no consequence, and retain the full value of the services that have been provided. Thus, rather than HSSA serving its purpose, to provide a cooling off period to buyers,[4] it has been transformed into a money back guarantee right.

This Note will undertake a comprehensive review of HSSA and the most relevant cases from Ohio to explain the current status of the law today. It will then review similar statutes and cases from other states to determine how they have handled consumer protections in regards to home solicitation sales. Finally, it will suggest several policy changes, specifically proposed judicial and legislative remedies, which will still allow HSSA to protect consumers from high-pressure home solicitation sales, while not being grossly unfair to the small businesses that make a living from selling their services in door to door solicitations.

II. ANALYSIS AND EXPLANATION OF HSSA

This Note will begin by undertaking a comprehensive analysis of HSSA to explain the current status of the law and its consequences. It will then cover specific fact patterns to highlight the inequitable outcomes that have occurred in Ohio. Both the text and the relevant Ohio court decisions will be covered.

A. Indefinite Right to Cancel as an Enforcement Mechanism for Notice Requirements

HSSA requires sellers to give three separate forms of notice to buyers. To ensure that consumers are aware of the their right to cancel,

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[3] Whether a buyer has been provided the cancellation form has been the subject of litigation. *See, e.g.*, *In re* Bayless, 326 B.R. 411, 417 (Bankr. E.D. Mich. 2005) (relying on witness's credible testimony in holding that no cancellation form was provided).

[4] Garber v. STS Concrete Co., 991 N.E.2d 1225, 1230–31 (Ohio Ct. App. 8th Dist. 2013) ("The HSSA seeks to decrease high-pressure sales tactics that are sometimes employed during in-home solicitations by providing consumers with a cooling-off period within which the transaction may be cancelled.").

the statutes require seller to (1) orally inform buyer of their right to cancel within three days,[5] (2) have the notification of the right to cancel printed on the sales agreement,[6] and (3) provide buyer with a pre-addressed cancellation form that a buyer can choose to mail in to affect cancellation.[7] Failure to comply with both divisions (A) and (B), that is, failure to have the notification printed in the sales contract and to provide buyer with a separate cancellation form, results in the buyer having an indefinite right to cancel the sales contract as the three day cancellation period does not begin to run until the buyer has complied with both of these divisions.[8] Since the oral notice requirement is not part of either division (A) or (B), failure to give oral notice presumably does not grant the buyer an indefinite right to cancel the sales contract. However, failure to give this oral notice will still trigger the rescission and treble damages remedies for the buyer under Ohio's Consumer Sales Protection Act, which will be explained subsequently. The strict requirements of the statute that trigger this indefinite right to cancel will largely be the topic of this paper, as they have been the subject of much litigation and have stymied the growth of small construction and home renovation businesses.

B. A Buyer's Remedies Under HSSA

If a seller fails to comply with the notice requirements under HSSA, the act allows a buyer to cancel the sales contract, and grants a

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[5] OHIO REV. CODE ANN. § 1345.23(D) ("In connection with any home solicitation sale, no seller shall: . . . (2) Fail to inform each buyer orally, at the time he signs the contract for the goods or services, of his right to cancel.").

[6] *Id.* § 1345.23:

> (A) Every home solicitation shall be evidenced by a written agreement or offer to purchase in the same language as that principally used in the oral sales presentation . . . The seller shall leave with the buyer a copy of the writing which has been signed by the seller and complies with division (B) of this section.

Subsection (B)(1) specifically requires the following statement to be "clearly and conspicuously" on the buyer's copy:

> [I]n bold-face type of the minimum size of ten points, in substantially the following form and in immediate proximity to the space reserved in the contract for the signature of the buyer: "You, the buyer, may cancel this transaction at any time prior to midnight of the third business day after the date of this transaction. See the attached notice of cancellation for an explanation of this right." *Id.* § 1345.23(B)(1).

[7] *Id.* § 1345.23(B)(2) (displaying the form that must be given in duplicate to buyer, in large part reiterating buyer's right to cancel the transaction within three business days).

[8] *Id.* § 1345.23(C):

> Until the seller has complied with divisions (A) and (B) of this section the buyer may cancel the home solicitation sale by notifying the seller by mailing, delivering, or telegraphing written notice to the seller of his intention to cancel. The three[-]day period prescribed by section 1345.22 of the Revised Code begins to run from the time the seller complies with divisions (A) and (B) of this section.

full refund for the buyer.[9] However, because a violation of any portion of HSSA is also considered to be a deceptive act under Ohio's Consumer Sales Protection Act ("CSPA"),[10] the buyer is given two additional remedies. The buyer may rescind the contract within a reasonable period of time, or the buyer may seek three times the amount of the consumer's actual economic damages, plus an amount not exceeding five thousand dollars in noneconomic damages.[11] In addition, a prevailing party may be awarded attorneys' fees.[12] Although HSSA and CSPA seem to be repeating remedies, Ohio courts have clarified that cancellation under HSSA is a distinct remedy from rescission under CSPA.[13]

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[9] *Id.* § 1345.23(D):

> [N]o seller shall . . . (4) Fail to refuse to honor any valid notice of cancellation by a buyer and within ten business days after receipt of such notice to: (a) Refund all payments made under the contract or sale; (b) Return any goods or property traded in, in substantially as good condition as when received by the seller; (c) Cancel and return any note, negotiable instrument, or other evidence of indebtedness executed by the buyer in connection with the contract or sale and take any action necessary or appropriate to reflect the termination of any security interest or lien created under the sale or offer to purchase. (5) Negotiate, transfer, sell, or assign any note or other evidence of indebtedness to a finance company or other third party prior to midnight of the fifth business day following the day the contract for the goods or services was signed. (6) Fail to notify the buyer, within ten business days of receipt of the buyer's notice of cancellation, whether the seller intends to repossess or abandon any shipped or delivered goods.

[10] *Id.* § 1345.28 ("Failure to comply with sections 1345.21 to 1345.27 of the Revised Code constitutes a deceptive act or practice in connection with a consumer transaction in violation of section 1345.02 of the Revised Code.").

[11] *Id.* § 1345.09(B):

> Where the violation was an act or practice declared to be deceptive or unconscionable by rule adopted under division (B)(2) of section 1345.05 of the Revised Code before the consumer transaction on which the action is based, or an act or practice determined by a court of this state to violate section 1345.02, 1345.03, or 1345.031 of the Revised Code and committed after the decision containing the determination has been made available for public inspection under division (A)(3) of section 1345.05 of the Revised Code, the consumer may rescind the transaction or recover, but not in a class action, three times the amount of the consumer's actual economic damages or two hundred dollars, whichever is greater, plus an amount not exceeding five thousand dollars in noneconomic damages or recover damages or other appropriate relief in a class action under Civil Rule 23, as amended.

[12] *Id.* § 1345.09(F):

> The court may award to the prevailing party a reasonable attorney's [sic] fee limited to the work reasonably performed and limited pursuant to section 1345.092 of the Revised Code, if either of the following apply: (1) The consumer complaining of the act or practice that violated this chapter has brought or maintained an action that is groundless, and the consumer filed or maintained the action in bad faith; (2) The supplier has knowingly committed an act or practice that violates this chapter.

[13] *See* Garber v. STS Concrete Co., 991 N.E.2d 1225, 1232 (Ohio Ct. App. 8th Dist. 2013).

C. The Issue

HSSA seems to have been contemplated for relatively minor purchases. Most are all familiar with the door-to-door salesperson attempting to sell a new set of kitchen knives, a magazine or newspaper subscription or even girl scouts selling cookies.[14] For the sale and purchase of minor goods, HSSA and its enforcement mechanisms seem to work just fine. However, HSSA completely fails when it comes to businesses providing services, particularly home construction, repair and renovation businesses that garner sales primarily through home solicitation sales. Upon cancellation, not only will these businesses go unpaid for any labor performed, but also will not have the goods that they provided returned to them since they have become part of the buyer's home.

One common example is roofing companies. Most home insurance policies provide an allotment for roofing repairs. Many companies take advantage of this by walking door-to-door looking for roofs that are in poor shape. When one is identified, the salesperson typically will knock on the door to solicit the homeowner into entering into an agreement for the company to repair or replace their roof and will inform the homeowner that many of the expenses will be covered under their homeowner's insurance policy.[15]

Once services have been performed on the home, whether it be installing a new roof or making some other type of renovation, both dissatisfied consumers and their attorneys have abused the HSSA. If a seller fails to fully comply with the HSSA's notification provisions (provide written notice of buyer's three day right to cancel along with a pre-addressed cancellation form that buyer can mail to seller to affect cancellation), the buyer can cancel the sale at any time with no obligation, even if the seller has already provided services in full. In other words, the buyer can walk away with a new roof or home renovations at no cost, with no requirement that there be any defect or dissatisfaction with the work whatsoever. The obvious result is that the seller will lose out on a large amount of money, oftentimes tens of thousands of dollars. Such a loss can be a devastating blow for most small businesses.

Still, in other instances, consumers who are upset with the services

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[14] Any purchase under twenty-five dollars is excluded from HSSA's regulations. OHIO REV. CODE ANN. § 1345.21(A)(1). However, if a buyer purchases twenty-five dollars or more of cookies, and this particular Girl Scout fails to provide the proper notices to a buyer, then the buyer is free to consume the cookies, cancel the sale, and receive a full refund. *See id.*

[15] This author has assisted with several cases that closely mirror this problematic hypothetical during his employment at a firm that primarily represents small businesses in the Columbus, Ohio area.

that have been performed and can find one provision of HSSA that has not been complied with can allege that they suffered damages, since they must now pay another company to redo the work of the seller. Since a violation of HSSA is deemed a deceptive act under CSPA, the buyer is then entitled to treble damages, attorneys' fees, and some noneconomic damages.[16]

Garber v. STS Concrete Co., L.L.C. illustrates precisely how HSSA has been abused by dissatisfied consumers.[17] In this case, Garber contracted with STS Concrete Co. ("STS") to redo the driveway, sidewalk, and steps of his home.[18] In accordance with the sales contract, STS "removed the concrete drive and sidewalk and poured a new driveway, sidewalk, and steps."[19] However, the sales contract given to Garber did not contain a notice of his right to cancel within three business days.[20] According to Garber, he was not satisfied with the work. A full ten months after completion of the work, Garber notified STS that he was rescinding the contract.[21] Thus, rather than serving its purpose of protecting consumers against high-pressure home solicitation sales, here HSSA was used to essentially give a consumer an ironclad warranty for the home construction services that he contracted for. The lesson is that as long as a consumer is lucky enough to do business with a company that may not be fully cognizant of the HSSA's notice requirements (or perhaps is dealing with a salesperson who simply forgets to hand over the notice of cancellation form), then that consumer has just been awarded those services for free. This, of course, is contrary to the intended purpose of HSSA. The statute was put in place to allow consumers to reconsider their agreement to pay for services when they agreed to those services under the pressure from a sly and assertive salesperson knocking on their door and delivering a sales pitch. The statute was not written with the purpose of allowing dissatisfied customers to keep the services (here a new driveway, sidewalk, and steps) and receive a full refund months after the work has been completed. Indeed, nowhere in this case did Garber claim that he wanted to rescind the contract because he soon regretted agreeing to pay for the services after such a sales pitch was made, nor was any other wrongdoing alleged. The dispute arose specifically because of Garber's dissatisfaction with the services. Because STS did not provide the required notice in its sales contract, Garber was entitled to all remedies available under either HSSA or CSPA.

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[16] OHIO REV. CODE ANN. § 1345.09(B).
[17] *See generally* 991 N.E.2d at 1225.
[18] *Id.* at 1228.
[19] *Id.*
[20] *Id.*
[21] *Id.* at 1228–29.

Kamposek v. Johnson is another clear example of HSSA being used to protect consumers' satisfaction, rather than protecting them from high-pressure home solicitation sales.[22] In this case, Ohio's Eleventh District Court of Appeals upheld thousands of dollars in damages because the seller did not provide buyers with a notice of cancellation.[23] The contract for services was for $28,800, and included "construction of a pole barn; an addition to the residence, including a basement; new windows; converting a garage into a bedroom and bathroom; and siding the entire house, including the addition."[24] The sellers had worked on the buyers' home for three months when the buyers decided that they were unsatisfied with the quality of the work, and refused to make any additional payments to sellers.[25] When the sellers stopped work, the buyers sued, seeking to revoke the sales agreement since they were never provided with a notice of their three-day cancellation right.[26] The court upheld the trial court's ruling that the sellers would have to refund all payments made to them by the buyers. Even though the sellers provided three months of labor and materials for the home, they were entitled to nothing.[27] The court then differentiated between cancelling a contract for goods and cancelling one for services:

> [I]f the items sold in this case were "goods," they would have to be returned to the seller. However, this is not the case if the items are "services." When a "service" is at issue, the seller bears the risk of starting prior to the expiration of the cancellation period.[28]

Again, as was the case in *Garber*, the lawsuit did not arise as the result of the buyers claiming that they were dissatisfied with his decision to agree to the services in the first place. The dispute arose specifically because the buyers were not satisfied with the work being performed. Both of these cases could have been remedied in the courts under a breach of contract claim, or under a claim that the seller failed in its duty to do the repairs or renovations in a workmanlike manner.[29] Instead,

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[22] *See generally* Kamposek v. Johnson, 2005-Ohio-334 (Ct. App.).
[23] *Id.* ¶¶ 3 & 35.
[24] *Id.* ¶ 3.
[25] *Id.* ¶ 4.
[26] *Id.* ¶¶ 3 & 5.
[27] *See id.* ¶ 35.
[28] *Id.* ¶ 32 (citations omitted).
[29] In Ohio, "[i]t is the duty of the builder to perform his work in a workmanlike manner; that is, the work should be done as a skilled workman would do it . . . the duty required is no more and no less than ordinary care." Mitchem v. Johnson, 218 N.E.2d 594, 597 (Ohio 1966) (internal quotation marks omitted). "'Workmanlike manner' has been defined as the way work is customarily done by other contractors in the community." River Oaks Homes, Inc. v. Twin Vinyl, Inc., No. 05CV001436, 2008 WL 3892260, at ¶ 29 (Ohio Ct. App. 11th

HSSA was used to place the sellers at a significant disadvantage, resulting in an inequitable outcome.

In one extreme case, an Ohio Court of Appeals upheld a cancellation nearly six years after work under a contract commenced, around four years after the seller stopped work.[30] Because the contract was cancelled, the seller was not entitled to any recovery.[31]

HSSA was meant to protect consumers from high-pressure home solicitations sales by giving them the unconditional right to cancel any agreements within three business days. However, because of the enforcement mechanism and the remedies attached to HSSA and CSPA, consumers can use these statutes to receive services in full at no cost, or, seek treble damages for any of the services with which they are dissatisfied. Thus, the remedies do not further the purpose of HSSA.

Furthermore, many home renovation businesses are small businesses. When speaking about a similar statute that invalidated home construction contracts, a Connecticut Supreme Court Justice stated:

> Many of these self-employed workers lack the education necessary to be aware of the potential impact of § 20–429 on their occupations and are unable to afford the expense of obtaining the assistance of counsel, which may be disproportionate to the amounts of the small contracts that provide their livelihood. The majority opinion construes § 20–429 to furnish homeowners who engage these tradesmen to perform home improvements with a virtual license to steal by invoking that statute after substantial work has been performed without a proper written contract.[32]

Given these reoccurring inequitable outcomes, HSSA should be amended by the Ohio legislature. Alternatively, Ohio courts should provide a more equitable remedy for sellers under these circumstances.

Dist. 2008) (internal quotation marks omitted). "Where a contractor fails to perform in a workmanlike manner, the proper measure of damages is the cost to repair the damage to the condition contemplated by the parties at the time of the contract. *Id.*

[30] Knight v. Colazzo, No. 24110, 2008 WL 5244640, at ¶¶ 3–4 & 21 (Ohio Ct. App. 9th Dist. 2008).

[31] *Id.* ¶ 21.

[32] Barrett Builders v. Miller, 576 A.2d 455, 464 (Conn. 1990) (Shea, J., dissenting) (discussing the Connecticut Home Improvement Act, which requires that any contract for home improvement shall be in writing and contain the entire agreement).

D. The Ohio Legislature and Ohio Courts Have Recognized and Mitigated Some of the Inequitable Remedies Available to Consumers Under HSSA and CSPA.

The Ohio Legislature and Courts have recognized the inequitable remedies provided to consumers under HSSA and CSPA, and have attempted to mitigate the inherent unfairness to home construction businesses. However, despite their efforts, HSSA is still being abused and needs to be amended.

The Supreme Court of Ohio has clarified that the rescission remedy under CSPA for a deceptive act is not available when there has been a substantial change in the subject of the consumer transaction.[33] In *Reichert v. Ingersoll*, appellee Charles Ingersoll refused to pay the balance owed to appellant, Reichert Construction Co. ("Reichert"), for certain construction work completed on appellee's home.[34] Reichert brought suit, and Ingersoll counter-claimed arguing that he was entitled to rescind the contract due to Reichert's deceptive act. The trial court found that appellant had committed a deceptive act under CSPA, allowed Ingersoll to rescind the contract, and awarded him a refund of all payments made to Reichert.[35]

Ultimately, the Supreme Court of Ohio reversed the trial court and held that, in accordance with the language of the statute,[36] rescission was not a proper remedy here because "rescission or revocation was not even attempted until well after the condition of appellees' home had been substantially changed."[37] Applying this case to the earlier hypothetical of a roofing company then, one of the two CSPA remedies (rescission) would be removed for a buyer who has already received a new roof. It is important to note that this substantial change limitation does not apply to HSSA's remedy of cancellation (which was not at issue in *Reichert.*) A subsequent decision by Ohio's Eleventh District Court of Appeals noted that unlike CSPA, "HSSA does not contain a substantial performance exception," and upheld the cancellation remedy for the buyer even after there was a substantial change in the subject of the consumer transaction.[38] Unfortunately, the Supreme Court of Ohio has

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[33] Reichert v. Ingersoll, 480 N.E.2d 802, 805 (Ohio 1985).
[34] *Id.* at 802–803.
[35] *Id.*
[36] OHIO REV. CODE ANN. §1345.09(C)(1) (West 2014):

> Except as otherwise provided in division (C)(2) of this section, in any action for rescission, revocation of the consumer transaction must occur within a reasonable time after the consumer discovers or should have discovered the ground for it and before any substantial change in condition of the subject of the consumer transaction.

[37] *Reichert*, 480 N.E.2d at 805 (stating that this substantial change limitation does not apply to HSSA's right to cancel the sales contract, as that provision was not at issue in this case).
[38] Kamposek v. Johnson, 2005-Ohio-334, ¶ 31 (Ct. App.):

not revisited this issue, nor has it taken on the issues associated with HSSA. However, there have been a few notable cases from the Ohio Courts of Appeals that deal with the remedies available to consumers.

Garber v. STS Concrete Co., from Ohio's Eighth District Court of Appeals held that a consumer must elect which remedy to base recovery on because the consumer cannot recover under both CSPA and HSSA.[39] In that case, Garber sought both cancellation under HSSA and treble damages under CSPA.[40] The Court held that Garber was precluded from seeking treble damages under CSPA since he had already elected to cancel the contract under HSSA.[41] Similarly in *Kamposek*, the Eleventh District held that rescission under CSPA and cancellation under HSSA are two distinct concepts and thus modified the trial court's holding from finding for both rescission and cancellation to just cancellation.[42]

Sellers who perform services in full and are forced to fully refund buyers after they exercise their right to cancel may be able to bring an unjust enrichment suit.[43] If such suits are successful, then this may be an adequate remedy for sellers who have their sale cancelled even after substantially or fully performing the contracted services. However, the Eighth District only discussed unjust enrichment rational in dicta, and there is not adequate case law to demonstrate that such unjust enrichment suits have been successful. Furthermore, this remedy does not apply to buyers who are seeking treble damages under CSPA (usually brought when they are not satisfied with the services received).

To summarize, when a seller is in violation of HSSA's notice requirements, either by not including the required cancellation notice in the sales contract left with the buyer or by not giving the buyer the required cancellation form, then the buyer is entitled to remedies under both HSSA and CSPA. HSSA's remedy is to allow the buyer to cancel the contract until the seller has fully complied with the notice requirements.[44] If the seller does not recognize that he or she is in violation, this essentially grants an indefinite right to the buyer to cancel the contract.[45] Once the contract is cancelled, the seller must return all

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> Unlike R.C. 1345.09, the HSSA does not contain a 'substantial performance' exception. Except as provided in R.C. 1345.27, the act does not require payments returned to the buyer to be offset by the benefit conferred upon the buyer under an unjust enrichment or quantum meruit theory. Thus, the Johnsons were not entitled to a setoff for the value of the improvements to the Kamposeks' property.

[39] *See* Garber v. STS Concrete Co., 991 N.E.2d 1225, 1233 (Ohio Ct. App. 8th Dist. 2013) ("A consumer must elect which remedy to base recovery on because the consumer cannot recover under both R.C. 1345.23 and 1345.09.").

[40] *Id.*

[41] *Id.*

[42] *Kamposek*, 2005-Ohio-334 at ¶ 27.

[43] *Garber*, 991 N.E.2d at 1232.

[44] OHIO REV. CODE ANN. §1345.23(C) (West 2015).

[45] Knight v. Colazzo, No. 24110, 2008 WL 5244640, at ¶ 19 (Ohio Ct. App. 9th Dist. 2008).

payments to the buyer.[46] The seller is entitled to recover any items sold, but because it is impossible to recover services or goods that become part of the buyer's home, the seller is afforded no remedy.[47] The caveat is that the seller may be entitled to an unjust enrichment suit, but there is no case on record demonstrating the success of any such suit.

CSPA affords buyers one of two options: either to rescind the contract or to seek treble economic damages.[48] It also allows for a limited amount of attorneys' fees and a limited amount of noneconomic damages.[49] However, where there has been substantial change to the subject of the consumer transaction, the rescission remedy will not be granted.[50] In *Reichert*, the Supreme Court of Ohio held that a substantial change occurred to a home that had undergone construction remodeling, and therefore, the rescission remedy was unavailable.[51]

Further, Ohio Courts of Appeals have stated that a buyer cannot seek remedies under both HSSA and CSPA.[52] Rather, the buyer must elect which remedy he or she would like to recover under.[53] Additionally, if the seller simply fails to orally inform the buyer of their right to cancel within three days, the buyer will still be entitled to the remedies afforded under CSPA, but not the cancellation remedy under HSSA.[54] The result of all of this is that sellers are often left with an inequitable remedy once they are found to be in violation of HSSA.[55] As was the case in both *Reichert* and *Kamposek*, the seller often substantially or fully performs the work and, in the end, is entitled to nothing.[56] Months of labor and thousands of dollars in the costs for materials and supplies are lost. Considering that many of these home renovation businesses are small, such a blow can be crippling.

E. The Ohio Legislature Has Recently Enacted a Cure Offer Statute That Further Mitigates the Harshness of CSPA on Ohio Businesses.

Recently, Ohio has enacted a cure offer that mitigates the negative impact that HSSA and CSPA have on small businesses that

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[46] OHIO REV. CODE ANN. §1345.23(D)(4)(a).
[47] *Id.* § 1345.27; *see Kamposek*, 2005 WL 238152, at ¶ 32.
[48] OHIO REV. CODE ANN. § 1345.09.
[49] *Id.* § 1345.09(F).
[50] *Reichert*, 480 N.E.2d at 805
[51] *Id.*
[52] *Garber*, 991 N.E.2d at 1233
[53] *Id.*
[54] OHIO REV. CODE ANN. §§ 1345.23(D)(2), 1345.28 (West 2015).
[55] *See Garber* 991 N.E.2d at 1228–29, 35 (noting that the buyers cancelled a contract six months after the work was completed and the court still awarded the buyers the entire contract amount of $6,200); *see Kamposek*, 2005 WL 238152, at ¶ 35 (upholding ruling that sellers must refund all payments made by buyers and sellers were entitled to nothing for three months of work and materials provided).
[56] *Garber*, 991 N.E.2d at 1228–29, 35; *Kamposek*, 2005 WL 238152, at ¶ 35.

practice home solicitation sales. O.R.C. § 1345.092 allows the seller to make a "cure offer" to attempt to remedy the dispute.[57] A cure offer affords sellers the opportunity to settle a claim filed against them within thirty days after service of process is completed upon the seller for any alleged violations of CSPA.[58] The cure offer must include a monetary remedy to the buyer, money for reasonable attorneys' fees, and court costs to settle the dispute.[59] The buyer will then have thirty days after the date of the receipt of the cure offer to file a notice of acceptance or rejection of the cure offer.[60] If the buyer rejects the seller's cure offer and a judge, jury, or arbitrator subsequently awards actual economic damages that are less than the value of the supplier's remedy in the cure offer, then the consumer is not entitled to treble damages, attorneys' fees, or court costs.[61]

Thus, the cure offer provision is simply a tool to settle a dispute between a buyer and a seller when the buyer may be entitled to remedies under CSPA. However, the cure offer provision does nothing to mitigate the essential issue addressed in this Note – that buyers will still have an indefinite right to cancel the sales contract if a buyer is not supplied with the proper HSSA notices.

F. Despite the Efforts of the Legislature and the Courts, HSSA Remains an Inequitable Remedy for Sellers and Should be Amended.

The crux of the matter is that HSSA was not meant to be a buyer's satisfaction remedy. Its purpose is to allow a consumer a cooling-off period following a possibly intimidating meeting with a savvy salesperson, so that consumers can reassess what they agreed to pay for once the salesperson leaves the home. Instead of being used for its intended purpose, HSSA is being used to cancel sales contracts long after substantial performance of any service has been completed. Ohio's Eleventh District Court of Appeals pointed out this exact problem in *Kamposek v. Johnson*, noting that the "HSSA does not contain a substantial performance exception."[62] "[T]he act does not require payments returned to the buyer to be offset by the benefit conferred upon the buyer under an unjust enrichment or quantum meruit theory."[63] Although HSSA does require that upon cancellation, "the buyer upon demand must make available to seller any goods delivered by the seller

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[57] OHIO REV. CODE ANN. § 1345.092 (West 2014).
[58] *Id.* § 1345.092(A).
[59] *Id.* § 1345.092(D).
[60] *Id.* § 1345.092(B).
[61] *Id.* § 1345.092(G).
[62] 2005-Ohio-334, ¶ 31 (Ct. App.).
[63] *Id.*

pursuant to the sale."[64] This is not helpful to home construction businesses. As *Kamposek* pointed out, "if the items sold in this case were goods, they would have to be returned to seller. However, this is not the case if the items are services."[65] "When a 'service' is at issue, the seller bears the risk of starting prior to the expiration of the cancellation period" and "[a]s such[,] the Kamposeks were not responsible for returning the items of the project or for paying the [sellers] for their value."[66]

Therefore, the case law and the addition of a cure offer in the statutes do not fully remedy the harsh impact that HSSA and CSPA have on small businesses, particularly ones performing services on a home.

III. How Have Other States Handled Home Solicitation Sales?

Most states surveyed are substantially similar to Ohio, requiring the seller to provide the buyer with a notice of his or her cancellation right, along with a pre-addressed cancellation form. However, there are a few states with some notable variations of this requirement.

In Florida, Idaho, Kentucky, Louisiana, Maine, Mississippi, New Hampshire and Oklahoma, the required notice to the buyer is substantially simplified. Most importantly, those states do not require both the notice in the written contract and the separate cancellation form. Rather, they only require the notice of cancellation to be included in the sales contract under a "conspicuous caption", and allow the buyer may cancel simply by providing written notice.[67] As a bonus, these

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[64] Ohio Rev. Code Ann. § 1345.27 (West 2014).

[65] *Kamposek,* 2005-Ohio-334, at ¶ 32.

[66] *Id.*

[67] *E.g.*, Fla. Stat. Ann. §501.031 (West 2014):

> The statement must: (a) Appear under the conspicuous caption, 'BUYER'S RIGHT TO CANCEL'; (b) Read as follows: 'This is a home solicitation sale, and if you do not want the goods or services, you may cancel this agreement by providing written notice to the seller in person, by telegram, or by mail. This notice must indicate that you do not want the goods or services and must be delivered or postmarked before midnight of the third business day after you sign this agreement. If you cancel this agreement, the seller may not keep all or part of any cash down payment."); Idaho Code Ann. § 28-43-403 (West 2014) ("The statement shall either: (a) Comply with any notice of cancellation or similar requirement of any trade regulation rule of the Federal Trade Commission which by its terms applies to the home solicitation sale; or (b) Appear under the conspicuous caption: 'BUYER'S RIGHT TO CANCEL,' and read as follows: 'If you decide you do not want the goods or services, you may cancel this agreement by mailing a notice to the seller. The notice must say that you do not want the goods or services and must be mailed before midnight of the third business day after you sign this agreement.

states do not have very specific font requirements, unlike most other HSSA statutes, including Ohio.

Arizona, Georgia, Louisiana, Mississippi, Oklahoma, and Rhode Island all have HSSA statutes that provide a liquidated damages clause or cancellation fee for sellers when buyers elect to cancel.[68] They all consist of some variation of allowing a five-percent cancellation fee, and some of them cap this at a small dollar amount.[69] For instance, the Mississippi statute warns that "[i]f you cancel, the seller may keep all or part of your cash down payment, but in no event may the seller retain an amount in excess of five percent (5%) of the cash price or the amount of the cash down payment whichever is the lesser."[70] The Rhode Island statute states "[t]he seller may retain as a cancellation fee five percent (5%) of the cash price; five dollars ($5.00); or the amount of the cash down payment, whichever is least."[71] Interestingly, Louisiana, which normally allows a five percent cancellation fee, forbids it if the seller has not complied with any of the Louisiana HSSA provisions.[72]

Five percent would certainly be an inadequate remedy in the event seller has already performed services in full. However, a cancellation fee that increases proportionally to the amount of work that has been performed would be a more helpful remedy.

Of all fifty states surveyed, Alabama is the only one that statutorily ensures that a buyer's right to cancel is not indefinitely extended if the seller fails to fully satisfy the notice requirements.[73] Instead, Alabama's HSSA statute caps the extended cancellation right to one year.[74] Other than this one-year cancellation cap, the remainder of Alabama's HSSA statute is very similar to Ohio's.[75]

IV. PROPOSED REMEDIES

This section is an overview of the possible solutions that Ohio

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[68] *E.g.*, ARIZ. REV. STAT. ANN. § 44-5007(C) (2014) (West) ("If the seller has performed any services pursuant to a home solicitation sale prior to its cancellation, the seller is entitled to a cancellation fee of five per cent of the cash price, fifteen dollars, or the amount of the cash down payment, whichever is less.").

[69] *E.g.*, *id.*

[70] MISS. CODE ANN. § 75-66-5 (West 2014).

[71] R.I. GEN. LAWS ANN. § 6-28-5(c) (West 2014).

[72] LA. REV. STAT. ANN. §9:3540(C) (West 2014) ("If the seller fails to comply with an obligation imposed by this section, or if the consumer avoids the sale on any ground independent of his right to cancel provided by the provisions on the consumer's right to cancel (R.S. 9:3538) or revokes his offer to purchase, the seller is not entitled to retain a cancellation fee.").

[73] *See* ALA. CODE § 5-19-12 (West 2015) (capping the time limit for buyer cancellation).

[74] ALA. CODE § 5-19-12 ("Until the seller has complied with this section the buyer may cancel the home solicitation sale within one year after the date of the sale by notifying the seller in any manner and by any means of the buyer's intention to cancel.").

[75] *Id.*

courts or the Ohio legislature may undertake to appropriately remedy the inequitable result of HSSA as it currently stands. All suggested solutions seek to balance the need to provide an enforcement mechanism as an incentive for businesses to comply with HSSA, while also eliminating the inequitable solution that the law currently provides. The Proposed Judicial Remedies subsection explores relevant case law from other jurisdictions that deal with either HSSA counterparts or statutes that are worded similarly regarding the three-day cancellation right. As will be shown, several jurisdictions have dispensed with the idea that sellers should completely bear the risk of providing services prior to the date in which the buyer has the right to cancel the transaction. Rather, they hold that the seller should be entitled to restitution damages for any work performed. The Proposed Legislative Remedies subsection explores ways in which the Ohio legislature can amend HSSA. Some of these propositions are derived from the proposed judicial remedies, others are based on provisions from HSSA statutes in other states, and some are simply alternate ways of accomplishing the same goal.

A. Proposed Judicial Remedies

The Ohio courts have not closed themselves off from further remedying the inequitable result of HSSA. To the contrary, Ohio's Eleventh District Court of Appeals noted that, "the HSSA is intended to be a 'shield' for the consumer, not a 'sword.'"[76] In fact, there is some legal precedent that Ohio courts could choose to adopt when dealing with HSSA. When interpreting the federal Truth in Lending Act ("TILA")[77], which contains very similar language as HSSA,[78] the U.S. Court of Appeals for the Sixth Circuit held that upon cancellation, rather than refunding all payments to the buyer, rescission should put the buyer in the same position he was in before the transaction.[79] Although TILA specifically calls for rescission as a remedy, rather than cancellation, the United States Bankruptcy Court for the Eastern District of Michigan applied the same effect of rescission to cancellation under Michigan's Home Solicitation Sales Act ("MHSSA").[80] Citing the Sixth Circuit, the

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[76] Kamposek v. Johnson, 2005-Ohio-334, ¶ 33 (Ct. App.).

[77] Truth In Lending Act, 15 U.S.C. §§ 1601 *et seq.* (2014).

[78] Rudisell v. Fifth Third Bank, 622 F.2d 243, 246–47 (6th Cir. 2001) (footnote omitted):

> TILA provides a right to rescind a transaction involving a security interest on the residence of the debtor until midnight of the third business day following the consummation of the transaction or the delivery of the disclosures required regarding the right to rescind and all other material disclosures, whichever is later. 15 U.S.C. § 1635. If the disclosures are never made, the debtor has a continuing right to rescind.

[79] *Id.* at 254.

[80] In re Bayless, 326 B.R. 411, 418 (Bankr. E.D. Mich. 2005); *see also* MICH. COMP. LAWS ANN. § 445.113 (West 2014). MHSSA is substantially similar to Ohio's, requiring both the

bankruptcy court in *In re Robert Bayless* held that although MHSSA states that upon cancellation, sellers are not entitled to compensation for any services performed,[81] it would nonetheless be unfair to allow a buyer to retain a substantial amount of renovations performed on his home, while a seller must return all payments.[82] In that case, the buyers contracted with the sellers for the installation of new windows, a roof and siding for their home.[83] The seller fully completed the work in July of 1995.[84] Approximately a year and a half later, the buyers sent notice that they were cancelling the sale since they were never provided with a notice of cancellation.[85] The court found that the sellers never informed the buyers of their right to cancel, so the cancellation by the buyers a full year and a half later was valid.[86]

However, rather than allowing the buyers to retain all of the renovations to their home, the Court stated that "to allow [the buyers] to retain these improvements without paying the amount owed to [the seller] would be an inequitable and uncalled for result."[87] The Court then cited *Rudisell* and applied its TILA holding and rationale to MHSSA. Although MHSSA uses the word cancellation, rather than rescission, the Court treated those terms interchangeably when it stated:

> Like the above cases, the remedy sought by [the buyers] here is rescission for a lender's failure to comply with laws aimed at protecting borrowers in credit sales transactions. Rescission is an equitable remedy. While rescission may be appropriate under the above-cited provisions of the MHSSA, the Court also holds that a corresponding condition to rescission must be payment to [seller] of the fair value of the improvements received. Even if Blue View were to have timely demanded return of the 'goods', it would have been impractical to remove roofing, siding and windows-items which became for all practical purposes permanently affixed to the home. Mr. Bayless testified that he was satisfied with the work performed; thus, Blue View should receive the fair value of those improvements. Fair value in this situation, the Court concludes, is the agreed

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notice of the buyer's right to cancel in the sales contract and a separate cancellation form. Also like Ohio, the buyer's three-day cancellation period does not begin until seller has fully complied with the notification provisions. *Id.* §445.113(4)

[81] MICH. COMP. LAWS ANN. § 445.115(2).

[82] *In re Bayless,* 326 B.R. at 418.

[83] *Id.* at 413.

[84] *Id.*

[85] *Id.*

[86] *Id.* at 417.

[87] *Id.* at 418.

> contract price of $17,855 ($17,955, less the $100 down payment made).[88]

Thus the Eastern District Court of Michigan has taken a more equitable approach to MHSSA than the Ohio courts' approach where the seller bears the risk when providing services. It is important to note that no Michigan courts have commented on the District Court's holding. However, *In re Bayless* can serve as a model for the Ohio courts.

Applying the Sixth Circuit's TILA rationale to Ohio's HSSA would remedy the problem this Note primarily addresses. Rather than allowing buyers to retain tens of thousands of dollars in home improvements upon cancellation simply because a portion of HSSA was not complied with, buyers would now be forced to pay sellers the fair value of all of the improvements made. Additionally, this remedy is superior to the unjust enrichment remedy proposed by *Garber* as it does not require additional litigation of the unjust enrichment claim.

The judiciaries in other states have recognized a similar principle. In particular, an Arizona Court of Appeals made a strong case in favor of sellers being able to recover under unjust enrichment principles upon cancellation by a buyer.[89] In *Pelletier v. Johnson*, the Arizona Courts of Appeals upheld a trial court ruling that sellers should be able to recover under an unjust enrichment theory after a buyer chooses to cancel.[90] Like Ohio's HSSA, Arizona's counterpart also requires a notice of buyer's right to cancel within three business days to be printed in the sales contract, and requires that the buyer be provided with a separate cancellation form.[91] Also like Ohio, the Arizona statute dictates the specific language that should be used.[92] In this case, buyers contracted with a seller to have vinyl siding installed on their home.[93] Although seller included a notice of buyer's right to cancel in the sales contract,

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[88] *Id.* at 418–19 (citations omitted).

[89] Pelletier v. Johnson, 937 P.2d 668, 669–70 (Ariz. Ct. App. 1996).

[90] *Id.*

[91] ARIZ. REV. STAT. ANN. § 44-5004 (West 2014):

> B. No agreement of the buyer in a home solicitation sale shall be effective unless it is dated, signed by the buyer and contains a conspicuous notice in the language used in the oral sales presentation which if in English would be as follows: . . . 4. You may cancel this agreement any time prior to midnight of the third business day after the date of this transaction. See the attached notice of cancellation form for an explanation of this right. . . . C. No agreement of the buyer in a home solicitation sale shall be effective unless the following completed form, in duplicate and in the language used in the oral sales presentation which, if in English, would be in the form set forth in this subsection, is attached to the contract or receipt.

[92] *Pelletier*, 973 P.2d at 669–70.

[93] *Id.* at 670.

the notice was not sufficient to comply with the statute.[94] The buyers then sought to cancel one week after the contract was executed.[95]

The court upheld the trial court's ruling that the seller should be able to recover under unjust enrichment principles because it was undisputed that the buyers were aware of their right to cancel within three days, and they failed to do so.[96] In addition, nothing in the statute precluded the seller from recovering upon cancellation, and the Act's purpose would not support such a prohibition on seller recovery.[97] The court then went on to adopt the rationale of a dissenting opinion in a Connecticut Supreme Court case:[98]

> In a 4-3 decision, the Connecticut [S]upreme [C]ourt held that a contractor whose agreement admittedly failed to comply with and was unenforceable under that state's Home Improvement Contractors Act, 1 Conn.Gen.Stat.Ann. § 20-429, could not recover in quasi-contract by demonstrating unjust enrichment of the homeowner for whom the contractor had performed work. *Barrett Builders v. Miller*, 215 Conn. 316, 576 A.2d 455 (1990). The dissent rejected "an interpretation [of the Act] so fraught with the danger of exploitation by the unscrupulous," *id.* at 335, 576 A.2d at 464, and noted that neither the statutory language nor its policy mandated that conclusion, which effectively "result[ed] in forfeitures enriching the homeowners regardless of the merits of the disputes or the value of the work performed." *Id.* at 333, 576 A.2d at 463. . . . In sum, we are persuaded by and therefore adopt the position of the dissent in Barrett Builders. That position is consistent with other authorities, including the Restatement (Second) of Contracts, § 197 (1981) ("Except as stated in §§ 198 and 199, a party has no claim in restitution for performance that he has rendered under or in return for a promise that is unenforceable on grounds of public policy *unless denial of restitution would cause disproportionate forfeiture*.")[99]

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[94] *Id.*
[95] *Id.*
[96] *Id.* at 671.
[97] *Id.*
[98] Barrett Builders v. Miller, 576 A.2d 455, 457 (Conn. 1990) (Shea, J., dissenting) (discussing the Connecticut Home Improvement Act, which requires that any contract for home improvement shall be in writing and contain the entire agreement); *see also* CONN. GEN. STAT. ANN. § 20-429 (West 2014).
[99] *Pelletier*, 973 P.2d at 671–72 (emphasis in original).

In the *Barrett Builders* dissenting opinion, Justice Shea summed up the issue as

> [N]ot whether a contract invalidated by § 20–429 should be enforced according to its terms, but whether a contractor who, out of ignorance or carelessness, has not reduced his oral agreement to writing or otherwise has failed to conform to § 20–429, must forfeit the entire value of the services and materials he has furnished to a homeowner without any recompense.[100]

He went on to analogize the situation to a contract that is unenforceable under the statute of frauds, which, according to the Restatement (Second) of Contracts, does allow for a restitutionary remedy "in order to prevent the statute from causing what all would agree to be a monstrous injustice."[101] The Restatement provides:

> Parties to a contract that is unenforceable under the Statute of Frauds frequently act in reliance on it before discovering that it is unenforceable. A party may, for example, render services under the contract or may make improvements on land that is the subject of the contract. The rule stated in this Section allows restitution in such cases. . . . Since allowing restitution does not amount to enforcement of the contract, it ordinarily does not contravene the policy behind the Statute. Restitution will not be allowed, however, if the Statute so provides or if restitution would frustrate the purpose of the Statute.[102]

Ohio's HSSA does not provide that a seller is not entitled to restitution upon cancellation. It is arguable that forcing a buyer to pay fair value for any of the services received, despite seller's failure to comply with HSSA, may provide a disincentive for some businesses to comply with the statute at all. But that argument is valid only to the extent that buyers have not been informed of their right to cancel within three days at all, and even if they were informed, then they would have actually sought to cancel within the allotted time period. In most of the cases explored, this has not been the case. In both *Garber* and *Kamposek* the dispute specifically arose when buyers became dissatisfied with the quality of the work, long after performance commenced.[103] The Arizona

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[100] *Barrett Builders*, 576 A.2d 455 at 461.
[101] *Id.* at 461–62; RESTATEMENT (SECOND) OF CONTRACTS § 375 (1981).
[102] RESTATEMENT (SECOND) OF CONTRACTS § 375 cmt.a (1981).
[103] *Garber*, 991 N.E.2d at 1228 & 29; Kamposek v. Johnson, 2005-Ohio-334, ¶ 4 (Ct. App.).

Court of Appeals used a similar reasoning, noting that "[t]here was no evidence that [buyers] would have acted differently had the contract fully complied with [Arizon'a HSSA counterpart], nor was there evidence that [buyers] were harmed by the noncomplying contract."[104]

Thus, as long as a seller has complied with at least one of the three required forms of notification, allowing restitutionary damages upon cancellation would not undermine the purpose of the statute, if that purpose is to allow a cooling-off period for a buyer to reassess his decision. Additionally, as the restatement points out, allowing a seller to recover restitution damages would not be the same as enforcing the contract[105] if the contract is cancelled before full performance, because the seller would only receive restitutionary damages, rather than the expectation interest of the contract. Perhaps a bright-line rule establishing that a seller should only be entitled to a fixed percentage of the fair market value of the renovations would better serve the purposes of the statute if sellers fail to provide buyers with any of the three required notices.

California's courts have spoken with the most clarity on striking a balance between providing equitable remedies to sellers while not providing a disincentive to follow HSSA's notification mandates. California has taken the position that a seller should be entitled to restitution following cancellation, even if the seller has not complied with the notification requirements, so long as the seller has not attempted to evade the purpose of the statute.[106]

Beley v. Municipal Court starts off just like most other HSSA cases. Buyers contracted with a seller to have their home remodeled.[107] The parties executed the contract on June 10, 1977, and the work was to be completed by August 15. The total contract price was $11,689.[108] The seller did not complete the work on time, and the buyer gave the seller a written notice of cancellation on November 10.[109] As a result, the seller brought suit for breach of contract and, alternatively, to receive payment for the work performed.[110] The Court held that the seller failed to give the buyers the required notice to inform them of their right to cancel within three days, and thus the statutory period to cancel extended indefinitely. The buyers argued that the statute gave them the right to "retain all the substantial benefits conferred by [s]eller's performance

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[104] Pelletier v. Johnson, 937 P.2d 668, 671 (Ariz. Ct. App. 1996).
[105] RESTATEMENT (SECOND) OF CONTRACTS § 375 (1981).
[106] *See* Beley v. Municipal Court, 160 Cal.Rptr. 508, 509–10 (Ct. App. 1979).
[107] *Id.* at 508–09.
[108] *Id.*
[109] *Id.* at 508.
[110] *Beley,* 160 Cal.Rptr. at 508–09 (specifically the seller brought an action for a common count for services performed and materials furnished at the special request of buyer; and the third cause of action was for an account stated).

without paying anything at all for them."[111] The Court disagreed.[112]

Even though the statute specifically states that "[i]f the seller has performed any services pursuant to a home solicitation contract or offer prior to its cancellation, the seller is entitled to no compensation,"[113] the court held that this did not preclude the seller in this case from recovering under quantum meriut theory since it would not be contrary to the purpose of that specific provision.[114] The court noted that the purpose of the no compensation for services provision was to prevent nefarious sellers from "spiking the job . . . [a]n unfair sales practice unique to home improvement sales" in which sellers will immediately begin construction during the three day cancellation period and then return later to finish the job.[115] The seller's hope is that if a buyer "realizes he has been duped, he normally will feel compelled to go along with the transaction since otherwise he would have to find someone else to repair his home."[116] The example the court used is a seller who immediately tears off portions of the old siding and replaces it with the new siding.[117] The homeowner will feel pressured to allow the buyer to continue the job, rather than cancelling the sale, leaving the house in poor condition and going through the trouble of finding a new company to replace the rest of the siding.

However, in this case, there was no attempt by the seller to spike the job, to otherwise "evade the statute or to pressure the buyer by the performance of a small portion of the contract within the first three days."[118] As a result, "[i]t would be grossly inequitable to interpret the statute to mean that seller gets no compensation even though buyer has the benefit of several thousand dollars' worth of home improvements.[119] However, the court did note that "in determining the reasonable value of the benefits conferred on [B]uyer, the court can also take into account the damages suffered by [B]uyer from the incomplete, delayed or improper performance of the job."[120]

In contrast, a later California case demonstrated the appropriate use of the no compensation for services clause. In *Louis Luskin & Sons, Inc. v. Samovitz* the seller did "spike the job" by beginning to perform the work under the contract the day after it was signed, even though the buyer "was emphatic that he wanted to obtain additional estimates and

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[111] *Id.* at 509.
[112] *Id.*
[113] *Id.* at 510.
[114] *Id.*
[115] *Id.*
[116] *Id.*
[117] *Id.*
[118] *Id.*
[119] *Id.*
[120] *Id.*

that the work was not to begin until and unless he specifically authorized it."[121] The court noted that "[t]his attempt to pressure Samovitz' by part performance within the three-day cancellation period was precisely the conduct [the no compensation for services clause] was intended to prevent."[122]

A later case attempted to limit the holding of *Beley*,[123] but because the case is unpublished, it appears to be of little consequence, as the California Rules of Court do not allow unpublished cases to be cited or relied upon by any court or party.[124]

Although some Ohio cases have hinted at allowing sellers to recover once a sale has been cancelled, Ohio has not come close to Arizona or California in ensuring that sellers will receive compensation. Arizona and California both make strong cases as to why seller recovery should be allowed. Not only is a lack of recovery for services grossly unfair, but it does not comport with the intended purpose of the statute. As a result, Ohio courts should adopt the rationale in both *Beley* and *Pelletier* and allow recovery for sellers.

B. Proposed Legislative Remedies

The Ohio legislature should amend HSSA to eliminate the inequitable result of the statute. Specifically, the legislature should look toward the HSSA variations that exist nationally, as well as explore why the Courts in Arizona and California have taken such strong issue with their respective HSSA statutes. Specifically, the Ohio legislature should consider the following amendments:

1. Eliminate the Triple Notification Requirement.

To begin, the statute should only require that consumers be notified of their right to cancel within three business days in conspicuous writing rather than requiring this notice to be given in the sales contract, a separate cancellation form and orally. This triple notification requirement is both excessive and unnecessary. Rather than micromanaging how and in what manner consumers be made aware of their right to cancel within three days, the statute should simply require

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[121] Louis Luskin & Sons, Inc., 166 Cal.App.3d 533, 538 (Ct. App. 1985).
[122] *Id.*
[123] Udi v. Rozenbaum, No. B227017, 2011 WL 5831769, at *1 (Cal. Ct. App. 2011) ("[A]lthough a plaintiff may be able to recover on quantum meruit even if there is a failure to provide the required notice, whether quantum meruit is appropriate is a decision for the trier of fact to make.").
[124] *See* CAL. R. CT. 8.1115(a) ("Except as provided in (b), an opinion of a California Court of Appeal or superior court appellate division that is not certified for publication or ordered published must not be cited or relied on by a court or a party in any other action.").

that consumers receive written notice of their right to cancel the sale. This can be accomplished by either providing the written notice of cancellation in the sales contract, or by providing the cancellation form, which largely reiterates the exact notice required to be given in the sales contract.

Not only would this ensure that consumers are aware of their right cancel within three days, but it would provide some layer of protection to small businesses that cannot afford to have an attorney on their payroll, and would not unduly punish a business simply because an employee made a mistake and failed to provide one of the required notices. As mentioned, several states already have such a provision, specifically Florida, Idaho, Kentucky, Louisiana, Maine, Mississippi, New Hampshire, and Oklahoma.[125]

The following hypothetical illustrates the need for this change: perhaps an employee provides a customer with the sales contract containing the required notice of cancellation and orally informs the customer of his or her right to cancel. Yet, for any number of possible reasons, the salesperson fails to furnish the customer with the cancellation form. Currently under this scenario, so long as the business does not realize its mistake, the buyer is granted an indefinite right to cancel the services he or she has just agreed to purchase, despite being fully aware of the right to cancel within three days. It is difficult to believe that this was the intended goal of the statute, but in light of *Kamposek* and *Garber*, this is not an unrealistic scenario. Typically, the dispute arises long after commencement of the work, usually when the buyer becomes dissatisfied with the services received and decides to contact an attorney. Naturally, attorneys familiar with HSSA and CSPA immediately ask the client for the sales contract, the notice of cancellation, and if the client recalls being orally informed of their right to cancel within three days. If not, the client is made aware of the loophole in which he or she can recover the monies paid for the services rendered to their home.[126]

Under this proposed change, buyers would not be granted an indefinite cancellation right. Rather, since they were provided one portion of the written notice of his or her right to cancel, the cancellation

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[125] Rudisell v. Fifth Third Bank, 622 F.2d 243, 254 (6th Cir. 2001).

[126] This author has assisted with half a dozen of such cases during his employment at a small law firm in Columbus, OH. The circumstances in these cases were nearly identical to *Kamposek* and *Garber*. Usually, the home renovation business has supplied the buyer with a notice of the right to cancel in the sales contract, and fails to furnish the proper cancellation form. At some point, the buyer is dissatisfied with the services, refuses to pay, and contacts an attorney. Plaintiffs' attorneys are always eager to point out any noncompliance with HSSA, and demands that any claim or demand for payment from buyer be immediately dropped. Oftentimes, this is accompanied by a threat to file suit and seek treble damages under CSPA.

right would remain limited to three days. This better serves the purpose of the statute to allow consumers to cancel high-pressure sales after they have been afforded a cooling off period, without requiring sellers to forfeit the total value of their work.

The only plausible explanation for requiring notice both in the sales contract and in a separate cancellation form is to ensure that consumers are given instructions on how to actually effect cancellation. However, the statute could be modified to state that cancellation can be effected simply by notifying the seller in any manner possible. A separate cancellation form with specific instructions is unnecessary.

2. *Buyers Should Not Be Granted an Indefinite Right to Cancel for Failure to Comply with the Notice Requirements.*

Buyers should not be awarded an indefinite right to cancel if a seller does not comply with HSSA. As long as buyers receive notice of their right to cancel the agreement within three days, there is no purpose to the indefinite right of cancellation. If buyers are aware of their right to cancel within three days, and choose not to, then consumer protections are not being advanced. Rather, small businesses are being forced to surrender thousands of dollars in services for what most small entrepreneurs view as a legal technicality. As made evident throughout this Note, not only is an indefinite right to cancel unfair to the small businesses, as sellers of services assume the risk that the sale will be cancelled, but this indefinite right is also untenable when it comes to the sale of goods. Most consumer goods will be of little or no value if recovered by the seller after the buyer has possessed them for any substantial period of time.

In the case of the sale of services, rather than converting the three day cancellation period into an indefinite one, the cancellation period should be extended until performance of the services has begun, provided that the buyer never expressed that he no longer wanted the services. After the services have begun, alternative remedies should be afforded. Along these same lines, a substantial performance exception like the one contained in CSPA should be added to HSSA, to make the cancellation remedy unavailable when the subject of the consumer transaction has undergone a significant change. At the very least, Ohio could cap the extension of the cancellation period, like the Alabama statute does.[127]

3. *HSSA Should be Amended to Require That Any Payments Returned to the Buyer Upon Cancellation be Offset by the*

[127] *See* ALA. CODE § 5-19-12 (2015).

Benefit Conferred Upon the Buyer Under an Unjust Enrichment or Quantum Meruit Theory.

The essential problem with the indefinite right to cancel the sales contract when it comes to the sale of services is that the services cannot be returned to the seller in the same manner that goods can. This problem could essentially be eliminated if the statute were altered to provide an unjust enrichment or quantum meruit remedy.[128]

> One is unjustly enriched when a
> [P]erson has and retains money or benefits that in justice and equity belong to another, as where the one party has conferred a benefit on another party without receiving just compensation for the reasonable value of those services, and it arises not only where an expenditure by one person adds to the property of another but also where the expenditure saves the other from expense or loss.[129]

This remedy could be expressed directly in the statute; that upon the cancellation of a sale, the seller need only return the portion of the money offset by the services already rendered to the customer. However, in cases where services have been fully rendered, such as a roof or driveway being fully installed, most sellers would be entitled to retain the full amount of any payments made pursuant to the sales contract.

It may be necessary that the statute simply be amended to require the seller to make a counter-claim for unjust enrichment in any suit in which services have been fully or substantially performed.[130]

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[128] As noted in Garber v. STS Concrete Co., 991 N.E.2d 1225, 1232 (2013), Ohio's Eighth District Court of Appeals suggested this very remedy.

[129] 18 OH. JUR.3D *Contracts* § 303 (1977).

[130] *Id.*:

> A successful claim of unjust enrichment requires that: (1) a benefit has been conferred by a plaintiff upon a defendant, (2) the defendant had knowledge of the benefit, and (3) the defendant retained the benefit under circumstances where it would be unjust to do so without payment. The purpose of unjust enrichment claims is not to compensate the plaintiff for any loss or damage suffered by it, but to compensate the plaintiff for the benefit it has conferred on the defendant. Thus, the basis of the equitable duty to compensate is lacking if there is no benefit conferred, or if full compensation has already been made.

4. Do Not Classify a Failure to Comply with HSSA as a Deceptive Act If Seller Has Given Some Sort of Notice to Buyer of His or Her Right to Cancel Within Three Business Days.

Currently, failure to provide a buyer with either the notice to cancel in the written contract, the cancellation form, or an oral notice of the consumer's right to cancel is classified as a deceptive act under CSPA, thus entitling the customer to either the remedy of rescission or treble damages. HSSA should be amended to declassify failure to comply with the notice requirements as a deceptive act so long as the customer was made aware of his or her right. Cancellation seems to be an adequate remedy.

5. Fine Companies that Violate HSSA.

Rather than punishing companies that fail to provide the required notices of cancellation by allowing buyers to retain the goods and services at no charge, the government could simply fine them. For instance, a statute could stipulate that if seller has substantially performed the services, then seller must pay a fine equal to a percentage of the total sale. Even if the percentage were relatively high, thirty percent or so, this would still be less damaging to small businesses than allowing buyers to retain the full value of the contract.

V. CONCLUSION

HSSA requires that home solicitation sellers notify buyers of their right to cancel within three days using three different methods: notification in the sales contract, a separate cancellation form which restates the right and orally. Failure to meet any of these three requirements constitutes a deceptive act under CSPA and gives sellers the right to either treble damages or to rescind the contract. The right to rescission is subject to the substantial change limitation enumerated by the Ohio Supreme Court in *Reichert v. Ingersoll.* If seller fails to comply with the first two notification requirements, then buyers have an indefinite right to cancel as a remedy. Upon cancellation, seller is required to return "any property traded in, [and] any payments made" under the contract.[131] Although the seller is permitted to retrieve any goods left with buyer, goods that become permanently affixed to the home, such as a new roof, cannot be recovered, nor can seller recover any money for services performed.

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[131] *See* OHIO REV. CODE ANN. § 1345.23(B)(4) (West 2014).

This threefold requirement does not further the purpose of the statute, instead, the indefinite right to cancel essentially makes HSSA a warranty guaranteeing that buyers will be fully satisfied with any of the services they are being provided with, as long as the salesman forgets to give the buyers a cancellation form, or alternatively, the buyer can give convincing testimony that he never received one. Further, the cancellation remedy can deliver unsustainable blows to small businesses that may lose tens of thousands of dollars. *Garber v. STS Concrete Co.* and *Kamposek v. Johnson* illustrate the problem quite well. In both of those cases, the buyer contracted with the seller to perform home restoration services, and the seller fully performed or substantially performed the services. However, in both of those cases, the seller failed to provide one of the required forms of notification, thus triggering the buyer's indefinite right to cancel. Pursuant to the statute, sellers had to refund all payments made to them, and sellers were entitled to no remedy. The end result was that the services and goods were provided for free. In both cases, the dispute arose specifically because buyers were dissatisfied with the work being performed and not because of any claim that they regretted the transaction in the first place because they felt pressured, or to any claim that the seller "spiked the job." If the purpose of the statute is to give buyers an added layer of protection against high pressure home solicitation sales by providing them with a three day cooling off period in which they can cancel, then the effect of the statute does not comport with this purpose.

The vast majority of other states do have HSSA statutes that are substantially similar to Ohio's; however, there are a significant number of states that greatly simplify the notification requirements. Rather than requiring notification in the sales contract, as well as providing the customer a separate cancellation form, a group of states simply require that the notice of cancellation be in the sales contract. Additionally, many of these states do not have the very specific font requirements. Several other states provide a five percent liquidated damages clause for sellers.

In Ohio, the courts have left open the option that sellers may be able to pursue an unjust enrichment suit against buyers, however, no opinions exist demonstrating that such suits have been successful. Courts in other states, such as Arizona and California have made convincing arguments as to why sellers should be able to recover restitutionary damages following cancellation by buyers. Ohio courts should adopt their rationale, and allow sellers to recover. Similarly, the Ohio legislature should amend the statute to alleviate the inequitable result, while still protecting consumers by giving them a cooling off period.